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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 705

HELEN K. HENJES AND EDMUND F. BOWEN, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF GERD H. HENJES, DECEASED, AND HENJES MARINE, INC., A CORPORATION, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 27-31) is reported at 87 F. Supp. 780.

JURISDICTION

The judgment of the Court of Claims was entered on January 3, 1950 (R. 32). The petition for a writ of certiorari was filed on March 27, 1950.

The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the Court of Claims erred in finding that the United States, in requisitioning a tug pursuant to the Merchant Marine Act of 1936, merely frustrated a charter agreement which had previously been entered into between the owner and certain contractors, and in holding that compensation to be paid by the Government should therefore be measured by the fair value of the tug at the time of the taking.

STATUTE INVOLVED

Section 902 of the Merchant Marine Act of 1936, 49 Stat. 1985, 2015-2016, as amended by the Act of August 7, 1939, Sec. 3, 53 Stat. (Pt. 2) 1255, 1256 (46 U.S.C. 1242), provides in pertinent part:

> SEC. 902. (a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be

paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition. The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section.

* * * * *

(d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code (U.S.C., 1934 edition, title 28, secs. 41, 250).

STATEMENT

Prior to August 1, 1942, Gerd H. Henjes was the sole owner of the Tug *Robert Henjes* (R. 19). The

Robert Henjes was originally built in 1916 as a steam vessel and was acquired by Mr. Henjes in 1938 and converted to a Diesel tug. Thereafter she was operated by Henjes Marine, Inc., as a Diesel tug in New York harbor until February 25, 1942, at which time she was delivered to certain contractors who were performing work for the Navy Department under a cost-plus-a-fixed-fee contract for the expansion of facilities at Floyd Bennett Field, Brooklyn (R. 19-20). This contract (Navy Contract NOy-5176 (R. 12-16)) provided for a Naval officer-in-charge of the work performed under the contract on behalf of the Government "for the purpose of safeguarding the interest of the United States" (R. 13). It stipulated that no equipment should be rented by the contractors at a rate of more than $100 per month, except after approval in writing by a duly authorized representative of the Navy (R. 13).

On March 11, 1942, the contractors, with the approval of the Naval officer-in-charge, entered into a charter or lease contract with Henjes Marine, Inc., for the use of the *Robert Henjes* at a rental rate of $100 per day (R. 20-21).[1] The charter (R. 7-10) was bareboat basis, whereby the contractors

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[1] Although the agreement was not executed until March 11, 1942, the tug was actually delivered to the contractors on February 25, 1942, and was continuously employed in the work at Bennett Field from the date of delivery to July 31, 1942. During this period rentals aggregating $14,100 were paid in accordance with the terms of the lease (R. 21-22).

agreed to furnish the crew and pay the other expenses of operation (R. 8, 21). The term of the lease was not specified, and Article IV provided that the contractors could terminate the agreement at any time it appeared to be to the Government's advantage (R. 8). Article V of the lease stated that the rental period should terminate when the tug was removed from the site of the work "unless title to the equipment passes to the Government at an earlier date" (R. 8). Article VII gave the Government the option, at the completion of the tug's work on the project or in the event of unsatisfactory performance by the tug, to purchase the vessel by paying to the lessor the difference in the amount of rent previously paid under the lease and the value of the vessel (R. 9). Attached to the charter was a schedule which set the agreed valuation of the vessel, for the purposes of the option, at $100,000 (R. 11, 21).

Pursuant to a request by a procurement officer of the Navy Department, the War Shipping Administration requisitioned the tug and delivered her to the Navy Department on August 1, 1942 (R. 22). This action was taken pursuant to Section 902(a) of the Merchant Marine Act of 1936,[2] *supra,* pp. 2-3 (R. 16, 22). The vessel was continued in use by the Navy in connection with the expansion of facilities at Bennett Field until January 23, 1943 (R. 22).

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[2] Hereinafter referred to as the Act.

A survey and an appraisal were made by the War Shipping Administration and on October 5, 1942, it offered Gerd H. Henjes $51,781 as compensation for the vessel (R. 23). Mr. Henjes declined the offer, and War Shipping, on October 12, 1942, advised him that, in accordance with Section 902(d) of the Act, *supra*, p. 3, he had the privilege of accepting 75 per cent of the award and suing the United States for any balance he deemed necessary to effect just compensation (R. 23). Mr. Henjes having executed a voucher for $38,835.75, which was 75% of the amount of compensation determined by the War Shipping Administration, a check in that amount was paid by the Government on October 2, 1943 (R. 24).[3]

On November 17, 1943, Henjes Marine, Inc., in the Supreme Court of New York, County of Kings, brought an action in contract against the charterers [contractors] to recover the sum of $15,100, the amount the tug would have earned under the charter from August 1, 1942 [the date of the requisition] to January 23, 1943 [the last date the tug was used in the work at Floyd Bennett Field], had it not been requisitioned (R. 24-25). That court dismissed the suit and entered judgment for the charterers [contractors] on the ground that the taking

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[3] Gerd H. Henjes died on September 23, 1943. The year's delay in payment was due to his efforts to get the amount of the award increased and to obtain assurance that none of his rights under the charter would be waived by acceptance of 75% of the award (R. 24).

of the vessel by the Government effectuated a frustration of the charter agreement sued upon (*Henjes Marine, Inc.* v. *White Const. Co., et al.*, 58 N.Y.S. 2d 384-388).

Following the New York court's dismissal, petitioners filed the present suit in the court below, contending that the Government, in requisitioning the vessel, exercised its option to purchase the tug in accordance with the terms of the charter agreement (R. 1-7). Petitioners claimed the sum of $91,900 [less, of course, the sum of $38,835.75 previously received], an amount admittedly due if the Government had exercised its option to purchase under the lease (R. 5-6). In the alternative, petitioners claimed the actual value of the tug at the time of the requisition, plus the rental value of $15,100 which it would have earned in the period August 1, 1942 to January 23, 1943 (R. 4-5). The Court of Claims, approving the Government's position that just compensation to petitioners should be measured by the fair value of the tug as of the date of taking, awarded petitioners the sum of $60,000 (R. 27-31), approximately $8,200 more than the sum determined by War Shipping Administration to be the fair value.

ARGUMENT

This case involves, in the main, merely a determination of the amount of money necessary to indemnify petitioners, and this determination depends on whether or not the charter agreement

with the contractors was frustrated by the Government's requisition of the tug. We submit that the court below, basing its conclusion primarily on factual considerations, was plainly correct in finding that the charter was frustrated, and that it was likewise correct in holding that the award of just compensation to petitioners should be measured by the fair value of the vessel at the time of the requisition.

1. Petitioners do not dispute the Court of Claims' determination of $60,000 as the reasonable value of the vessel at the time of the taking. Petitioners urge, however, and it is their principal argument, that to this amount should be added the rental value of $15,100 which would have been earned by the tug from August 1, 1942, until January 23, 1943, had the vessel not been requisitioned (Pet. 9-16, 19-22). To support this contention, petitioners rely primarily on an alleged taking or appropriation of the charter agreement by the Government, and they urge that the charter agreement is a property right for which they must be compensated (Pet. 9-16).[4] At the outset, it should be noted that it is extremely doubtful whether the charter agreement involved is

[4] It is doubtful whether this contention may be properly advanced in this Court, since it was not asserted in the petition in the court below, and since that court assumed that petitioners' claim for rental hire was based on the theory of contract damages for the breach of the charter agreement (R. 30).

a property right within the just compensation clause of the Fifth Amendment to the United States Constitution, since Article IV of the agreement expressly provided that the charter might be terminated by the contractor "at any time that it appears to the Government's advantage to do so, and payment of rental then due shall constitute payment in full" (R. 8). Cf. *United States* v. *Petty Motor Co.*, 327 U.S. 372; *United States ex rel. T.V.A.* v. *Powelson,* 319 U.S. 266; *Southern Pacific Co.* v. *City of Portland,* 227 U. S. 559; *Sears* v. *City of Akron,* 246 U. S. 242.

Assuming, *arguendo,* that the charter involved is a property right for which the Fifth Amendment requires compensation to be made in the event of a taking by the Government, petitioners' claim must fail, since the charter agreement was not appropriated by the Government. Clearly, there was no intention or attempt on the part of the Government to take or utilize the charter. There is nothing in the Navy Department's request that the tug be requisitioned (R. 22) or in the War Shipping Administrator's requisition order (R. 16) to indicate that there was an intention on the part of the Government to acquire anything more than the tug itself; nor do the subsequent actions of the Navy Department in connection with the use of the tug on the project show that the charter had been acquired in the taking of the tug. It should not, therefore, be lightly assumed that it was the intention of the

Government officers to acquire the charter when they requisitioned the tug, particularly since Section 902(a) of the Act, *supra*, pp. 2-3, under the authority of which they effected the taking of the tug, does not contain a provision authorizing the taking of a contract, and since it is obvious that the Government was interested solely in acquiring the tug.[5] The requisition of the vessel, then, effected but a frustration of petitioners' charter with the contractors and in no way constituted a taking or appropriation of it. See *Union Petroleum S. S. Co.* v. *United States*, 18 F. 2d 752 (C.A. 2), certiorari denied, 274 U. S. 760; *The Frankmere*, 262 Fed. 819 (E.D. Va.), affirmed, 278 Fed. 139 (C. A. 4), certiorari denied, 257 U. S. 662; cf. *Texas Co.* v. *Hogarth Shipping Co.*, 256 U. S. 619.

It is well settled that the incidental loss or frustration of private contracts by lawful governmen-

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[5] Thus the cases cited by petitioners in support of this phase of their argument are not in point or are clearly distinguishable. In *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106 (Pet. 10-11) and *Long Island Water Supply Co.* v. *Brooklyn*, 166 U.S. 685 (Pet. 13-14), the statutes providing for condemnation expressly included contracts, and these were in fact taken by the condemnor with the intent to do so. In *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (Pet. 12-13), a lock and dam was the property taken. The franchise to collect tolls was not a contract merely incidental to the property taken but was an integral part of it. Moreover, as this Court has observed since, the decision in that case rested in part on the doctrine of estoppel since the lock and dam was built pursuant to the invitation of the United States. *Greenleaf Lumber Co.* v. *Garrison*, 237 U.S. 251, 264; *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U.S. 82. Finally, the contracts involved in these cases were not, as here, revocable on the part of the condemnor. See *supra*, p. 5.

tal action is but a consequential loss and is non-compensable. *Omnia Commercial Co.* v. *United States,* 261 U. S. 502; *Mullen Benevolent Corp.* v. *United States,* 290 U. S. 89; *Mitchell* v. *United States,* 267 U. S. 341. Were the rule otherwise and were petitioners' contentions sound, the United States, when exercising its power of eminent domain, would become "liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things." *Omnia Commercial Co.* v. *United States supra,* p. 513. Moreover, Congress expressly guarded against liability on the part of the United States for loss incidental to the requisition of a vessel by providing that "the owner shall not be paid for any consequential damages arising from a taking * * * of property under authority of this section." Section 902(a) of the Act, *supra,* pp. 2-3.

As an alternative argument for the additional recovery of the charter hire of the tug for the period August 1, 1942 to January 23, 1943, petitioners contend that the Government in effect was a party to the charter agreement, that it abrogated the agreement by the requisition, and that it must, therefore, respond in damages for breach of contract (Pet. 19-22). There are several obstacles to this theory. Despite petitioners' assertions to the contrary (Pet. 17, 21), the Government was not a

party to the agreement nor did the court below in any way indicate that it was. Since there was no privity of contract between either Gerd H. Henjes or Henjes Marine, Inc., and the United States, petitioners cannot sue the Government in contract. *Merritt* v. *United States,* 267 U. S. 338. And even though the United States had been a party to the charter agreement, the result would be no different. It is well settled that when the Government, acting in its sovereign capacity, prevents or frustrates the performance of a contract between it and one of its citizens, no recovery can be had as for breach of contract. *Horowitz* v. *United States,* 267 U. S. 458; see *Lynch* v. *United States,* 292 U. S. 571, 579. Consequently, as the court below said (R. 30), "it is apparent that the damages which [petitioners] suffered, if any, were damages of frustration and not of appropriation, and are not compensable. *Omnia Commercial Co.* v. *United States,* 261 U. S. 502." See also *Georgia Hardwood Lumber Co.* v. *United States,* 78 F. Supp. 808 (Ct. Cls.).

In the circumstances, it is clear that the fair value of the tug at the time of the requisition is the correct measure of just compensation to be paid to petitioners, for the destruction of petitioners' charter was but an incident to the taking of the vessel, and "In [the] absence of a statutory mandate * * * the sovereign must pay only for what it takes, not for opportunities which the owner may lose." *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S.

266, 281. See also *Mitchell* v. *United States,* 267 U. S. 341, 345.

2. Petitioners make the further contention that the action of War Shipping Administration in requisitioning the tug pursuant to Section 902(a) of the Act constituted an exercise of the Government's option to purchase under Article VII of the charter agreement (Pet. 16-19).[6] The contention is devoid of merit.

Petitioners rest this argument upon *Muschany* v. *United States,* 324 U. S. 49 (Pet. 17-19). That case is not in point, however, for there the Government had entered into option contracts for the purchase of land which contained stipulations that, in the event of condemnation of the land by the United States, the option price in the contracts should measure the land owner's compensation. This Court held that the Government could not avoid the contracts in subsequent condemnation proceedings on the ground that they were contrary to public policy, but must abide by the option price as contained in the agreements. An entirely different situation is presented here, for, as the court below said (R. 30), "no such contractual obligation is found in the instant case." Nor does the record disclose even an attempt on the part of the Government to accept its option to purchase. On the contrary, the court below found (R. 22), and petitioners admit (Pet. 19),

[6] Although this was their principal contention in the court below, petitioners advance it secondarily here.

that War Shipping, in acquiring the tug, acted pursuant to Section 902(a) of the Act. Moreover, it is doubtful that the Government could have exercised its option to purchase even had it so desired, since on August 1, 1942, neither of the events stipulated in Article VII of the charter (R. 9) as giving rise to the option had occurred, i.e., the tug had not completed its work on the project, and it had not been determined that the vessel was unsatisfactory for the work. In any event, to sustain petitioners' contention that the Government exercised its option when it took the tug would have a far-reaching effect on the sovereign power of the United States to requisition a vessel for war purposes, since it would establish a rule that the Government may be required to pay more than just compensation for property taken under that power if the Government happens to have an option to purchase it for a greater amount. Such a rule would, in effect, turn an option into an obligation, since it would require the United States to take under the option rather than under its sovereign power. The contention is patently untenable. See *United States* v. *Certain Parcels of Land, Etc.*, 55 F. Supp. 257 (D. Md.).

CONCLUSION

The decision below is correct, and there is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

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